Supreme Court, U.S.
FILED
MAR 5 1992
OFFICE OF THE CLERK

No. 91-712

**IN THE SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM 1991

UNITED STATES OF AMERICA,
Petitioner

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR AMICUS CURIAE AND REAL PARTY IN INTEREST RENE MARTIN VERDUGO-URQUIDEZ

LAW OFFICES OF
GOLDBERG, FRANT & HALL
2870 Fourth Avenue, Suite 100
San Diego, California 92103
619/297-1111

PATRICK Q. HALL
CHARLES L. GOLDBERG
Attorneys for Amicus Curiae and
Real Party in Interest
RENE MARTIN VERDUGO-URQUIDEZ

QUESTION PRESENTED

1. Whether the transborder kidnapping from Mexico of two Mexican nationals by United States agents, which action violates the laws of Mexico and the existing extradition treaty with Mexico, mandates repatriation of the victims upon the repeated and unequivocal demands of Mexico.

TABLE OF CONTENTS

Interest of Amicus Curiae 1

Opinions below 2

Jurisdiction 3

Treaty Involved 3

Statement of the Case 3

Summary of Argument 12

Argument 16

I KIDNAPPING FOREIGN NATIONALS TO DELIBERATELY BYPASS AN EXISTING EXTRADITION TREATY VIOLATES THE PURPOSES AND SPIRIT OF THE TREATY, THUS BREACHING AN IMPLICIT CONDITION 16

II THE TREATY VIOLATION HAS DEPRIVED ARTICLE III COURTS OF ANY JURISDICTION TO HOLD RESPONDENT AND AMICUS CURIAE TO ANSWER FOR CRIMINAL OFFENSES AGAINST THE UNITED STATES 34

III THE KER-FRISBEE DOCTRINE IS INAPPLICABLE TO THE SPECIFIC FACTS OF THIS CASE 40

IV THE VICTIM OF THE KIDNAPPING HAS STANDING TO RAISE THE TREATY VIOLATION AS A BAR TO HIS PROSECUTION IN THE OFFENDING COUNTRY 48

V THE INSTANT ISSUE IS NOT A POLITICAL QUESTION 58

Conclusion 65

TABLE OF AUTHORITIES

Cases:

Air France v. Saks
470 U.S. 392, 397 (1985) ..... passim

The Amiable Isabella
19 U.S. (6 Wheat)
1, 72 (1921) 17

In re Baiz
135 U.S. 403 (1890) 59

Baker v. Carr
369 U.S. 186 (1962) ..... passim

Banco Nacional de Cuba v. Sabbatino
376 U.S. 398, 423 (1964) 29

Bacardi Corp. v. Domenech
311 U.S. 150, 165
fn.12 (1940) 18

Bivens v. Six Unknown Named Agents
of the FBI
403 U.S. 388 (1971) 52,62

Choctaw Nation of Indians v.
United States
318 U.S. 423,
431-432 (1943) 17

Clark v. Allen
331 U.S. 503 (1947) 58

Cook v. United States
288 U.S. 102 (1933) .....passim

Dennis v. Higgins
111 S.Ct. 865 (1991) 48

Factor v. Laubenheimer
290 U.S. 276 (1933) .....passim

Frisbee v. Collins
342 U.S. 519 (1952) 13,42

Ford v. United States
273 U.S. 593 (1927) .....passim

Goldwater v. Carter
444 U.S. 996 (1979) 60-62

Japan Whaling Association v.
American Cetacean Society
478 U.S. 221 (1986) 62

Johnson v. Browne
205 U.S. 309 (1907) 48

Jordan v. Tashiro
278 U.S. 123 (1972) 17

Ker v. Illinois
119 U.S. 436 (1886) .....passim

Mahon v. Justice
127 U.S. 700 (1888) 47

Marbury v. Madison
5 U.S. (1 Cranch) 137 (1803) .. 62

Maximov v. United States
373 U.S. 49 (1963) 17

Murray v. The Charming Betsy
6 U.S. 64 (1804) 32

The Paquete Habana
175 U.S. 677 (1900) 29,64

Sierra Club v. Morton
405 U.S. 727 (1971) 53

Societe Nationale Industrielle Aerospatiale v. United States District Court,
482 U.S. 522 (1987) 16

Society for the Propagation of Gospel in Foreign Parts v. New Haven
21 U.S. (8 Wheat)
464 (1923) 59

Sumitomo Shoji American Inc. v. Avagliano
457 U.S. 176 (1982) 17

Terlinden v. Ames
184 U.S. 270 (1902) 59

Texas Pacific Railway Co. v. Rigsby
241 U.S. 33 (1916) 52

The Three Friends
166 U.S. 1, 63 (1897) 59

United States v. Choctaw Nation
179 U.S. 494 (1900) 27

United States v. Rauscher
119 U.S. 407 (1886) .....passim

United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 34

United States v. Curtiss-Wright Corp.
299 U.S. 304 (1936) 34

Valentine v. U.S.
299 U.S. 5 (1936) 48

Weinberger v. Rossi
456 U.S. 25, 32 (1982) 32

Werth v. Selden
422 U.S. 490, 498-499 (1975) ... 54

Collier v. Vaccaro
51 F.2d 17 (4th Cir. 1931) 39

Emani v. District Court
834 F.2d 1444
(9th Cir. 1987) 61

Ex Parte Lopez
6 F.Supp 342 (S.D.Tex. 1934) ... 46

Fiocconi v. Attorney General
of United States
462 F.2d 475 (2d Cir. 1972)
cert. denied,
409 U.S. 1059 (1972) 26-27,57

Jaffe v. Smith
825 F.2d 304
(11th Cir. 1987) 39,43

Matta-Ballesteros v. Henman
896 F.2d 255 (7th Cir. 1990)
cert. denied
111 S.Ct. 209 (1990) 45,55

Rodriguez-Fernandez v. Wilkinson
654 F.2d 1382
(10th Cir. 1981) 30

Shapiro v. Secretary of State
499 F.2d 527
(D.C. Cir. 1974) 61

Stevenson v. United States
381 F.2d 142
(9th Cir. 1967) 45

Theron v. United States Marshal
832 F.2d 492
(9th cir. 1987) 61-62

United States v. Cordero
668 F.2d 32 (1st Cir. 1981) ... 44

United States v. Cotten
471 F.2d 744 (9th Cir. 1973)... 44

United States v. Cuevas
847 F.2d 1417 (9th Cir. 1988)
cert. denied,
109 S.Ct. 422 (1989) 56

United States v. Davis
767 F.2d 1025 (2d Cir. 1985)... 46

United States v. Diwan
864 F.2d 715 (11th Cir. 1989) .. 56

United States ex rel. Donnelly v.
Mulligan
76 F.2d 411
(2d Cir. 1935) 57

United States v. Hamilton
460 F.2d 1270
(9th Cir. 1972) 44

United States v. Herrera
504 F.2d 859 (5th Cir. 1974)... 44

United States v. Kaufman
858 F.2d 994 (5th Cir. 1988)...passim

United States v. Lira
515 F.2d 68 (2d Cir. 1975)
cert. denied,
423 U.S. 847 (1975) 44

United States v. Lovato
520 F.2d 1270
(9th Cir. 1975) 44

United States v. Marzano
537 F.2d 257 (7th Cir. 1976)... 45

United States v. Postal
589 F.2d 862, 875
(5th Cir. 1979),
cert.denied,
444 U.S. 832 (1979)..... 39

United States v. Rosenthal
793 F.2d 1214
(11th Cir. 1986) 45

United States v. Toro
840 F.2d 1221
(5th Cir. 1988) 44

United States v. Valot
625 F.2d 308 (9th Cir. 1980) .. 44

United States v. Zabaneh
837 F.2d 1249, 1261
(5th Cir. 1988) 46,56

United States ex rel. Lujan v. Gengler
510 F.2d 62 (2d Cir. 1974)
cert. denied
421 U.S. 1001 (1975) 45

Wentz v. United States
244 F.2d 172, 176
(9th Cir. 1957) 45

United States v. Evans
667 F.Supp. 974, 979
(S.D.N.Y. 1987) 46

United States v. Ferris
19 F.2d 925 (N.D. CA 1927) 39

United States v. Schouweiler
19 F.2d 387 (S.D. CA 1927) 38

Treaties

Charter of the United Nations,
June 26, 1945 59 Stat. 1031
T.I.A.S. No. 993,
Article 2 (4) 31

Charter of Organization
of American States,
April 30, 1948,
2 U.S.T. 2394, 2429,
T.I.A.S. No. 2361 31-32

Treaty on Extradition, May 4, 1978,
United States-Mexico,
31 U.S.T. 5059,
T.I.A.S. No. 9656 ..... passim

Statutes

22 U.S.C. Section 2291(c) 32

Miscellaneous

Letter of Secretary of State
James Blaine to O.R. Roberts,
Governor of Texas (May 3, 1881),
in Domestic Letters of the
Department of State,
1784-1906 (National Archives
Microfilm Publication
M40, Rule 93) 27

Foreign Assistance Act of 1961, Section 481(C) 32

Hearings on S. 1429 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary 99th Cong., 1st Sess. (1986) 28

IV Moore, International Law Digest, 321 (1906) 49

Presidential Message, Extradition Treaty Between the United States and Mexico-Changes in the New Treaty at 19 26

Restatement (3d) of Foreign Relations Law of the United States, Section 432(2) 31

Sen.Comm. on For. Rels., Internal Security Assistance and Arms Expert Control Act, Report On S. 2622, S.Rep.No. 605, 94th Cong., 2d Sess. 55 (1976) 33

No. 91-712

**IN THE SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM 1991

UNITED STATES OF AMERICA,
Petitioner

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR AMICUS CURIAE AND REAL PARTY IN INTEREST RENE MARTIN VERDUGO-URQUIDEZ

INTEREST OF AMICUS CURIAE

RENE VERDUGO-URQUIDEZ is the Respondent in Case No. 91-670, Petition for Certiorari pending. In January of 1986, he was kidnapped from Mexicali, Baja California, Mexico by paid agents of the U.S. in violation of the

U.S.-Mexico extradition treaty. Mexico objected to his kidnapping. The Court's decision in the instant case will directly affect the authority of the Bureau of Prisons to confine him and the U.S. District Courts to enter and/or enforce an invalid judgment of criminal conviction against him.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 946 F.2d 1466. The decision of the District Court is reported at 745 F.Supp. 599. The decision of the Court of Appeals was founded on the authority of U.S. v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), Petition for Certiorari pending, No. 91-670. The opinion of the District Court with respect to Amicus Curiae's rights under the Extradition Treaty,is unreported.

JURISDICTION

The jurisdiction of this Court to decide whether Article III Courts possess personal and subject matter jurisdiction over Respondent and Amicus Curiae rests on Title 28, U.S.C. section 1254(1). Respondent and Amicus Curiae have consistently asserted that the District Court lacked jurisdiction to proceed with criminal actions.

TREATY INVOLVED

The Extradition Treaty between the U.S. and the United Mexican States, which entered into force on May 4, 1978, is located at 31 U.S.T. 5059, T.I.A.S. No. 9656, and is reprinted in the Joint Appendix at pages 72-87.

STATEMENT OF THE CASE

Amicus Curiae would join in the Statement of the Case filed by Respondent ALVAREZ-MACHAIN with respect

to the circumstances concerning his appearance before the District Court.

At an evidentiary hearing, Amicus Curiae would show that from as early as April, 1985 through January 24, 1986, U.S. law enforcement officers formulated a plan to unlawfully kidnap Respondent and others from the Republic of Mexico in connection with Operation Leyende, the official investigation into the disappearance and death of DEA Special Agent Enrique Camarena-Salazar.

U.S. law enforcement officers and Department of Justice officials discussed among themselves their unilateral conclusion that the formal extradition of Mr. VERDUGO from the Republic of Mexico pursuant to the long-standing Extradition Treaty entered into between the two countries would not be successful. These persons neither consulted with appropriate Mexican

officials or considered a request for the provisional arrest of VERDUGO pursuant to the Treaty. Intentionally and deliberately determining that they would not make a request for the extradition of Respondent, U.S. law enforcement officials contacted a group of men, (some corrupt, local Mexican police officers), who had previously performed kidnappings. These men did not seek to enforce any Mexican laws but rather were acting solely for their own pecuniary interests. The U.S. agents then masterminded the kidnapping and transportation of VERDUGO to the U.S. It is believed that $50,000 was given to these six men in advance of their actions. Additionally, promises of the payment of another $50,000 when the job was finished were made.

On January 24, 1986, while driving his vehicle on a street in San Felipe,

Baja California, Mexico, Mr. VERDUGO was forced to stop his vehicle by the six plain-clothed individuals, who were driving two unmarked vehicles.

Without identifying themselves, these individuals forcibly opened the door to Mr. VERDUGO's car and physically removed him. He was then forced into the rear seat of one of the two cars driven by the six individuals and was forcibly handcuffed, his hands twisted behind his back. One of the six men placed a blindfold on Mr. VERDUGO's head and forced his head down below the windows of the car. At some point, a jacket was placed over Mr. VERDUGO's head. He was held in this position the entire time. He nearly suffocated due to the manner in which he was held captive. During the entire trip, Mr. VERDUGO was in fear for his life.

Two unidentified U.S. law enforcement officials were present at the scene of the stop and supervised the kidnapping. The agents followed the two vehicles as they transported Mr. VERDUGO towards Mexicali. Upon their arrival at the border, Mr. VERDUGO was pushed through a hole in the U.S. border fence just west of Calexico. There, he was taken into custody by U.S. law enforcement officials who were awaiting his forced entrance into the U.S. Shortly thereafter, his residence(s) in Mexico were searched by U.S. and Mexican law enforcement officers without a warrant. U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990).

After the circumstances of Mr. VERDUGO's abduction were investigated, a Mexican prosecutor issued arrest warrants in the Republic of Mexico charging five of the six individuals

with kidnapping and false imprisonment. These individuals have been admitted into the U.S. Witness Protection Program, where they apparently remain today.

The Republic of Mexico, in its first diplomatic note dated April 23, 1986, (Appendix. A, at pp. 2a), noted that the reports of Mr. VERDUGO's abduction by former Mexican police personnel hired by U.S. authorities, if true, "occurred without the knowledge of the Mexican Federal authorities and are violations of Mexican law and international law."

On August 26, 1987, the Republic of Mexico responded that "it cannot recognize as valid a judicial practice that disregards the procedures established by the extradition treaty currently in force between Mexico and the U.S. The reason for this being that such practice constitutes an

infringement of the constitutional guarantee of due process of law that in cases of deprivation of liberty like this one is recognized by the Political Constitutions of both Mexico and the United States of America." The note further requested the "kind mediation of the Department of State" in "informing the corresponding United States judicial authorities of the position of the Mexican government, so that this case will be properly clarified". (App. B, infra, pp. 4a-7a).

At a hearing held on June 20, 1988, the District Court had denied Amicus Curiae's motion to dismiss the third superseding indictment, which charged five counts of kidnapping, murder, conspiracy, and violent crimes in aid of racketeering due to the manner of his apprehension. The Court declined to hold an evidentiary hearing for the

purposes of establishing the extent of official U.S. involvement in the kidnapping.

After a two month jury trial, Mr. VERDUGO, an innocent man, was convicted on all counts and sentenced to serve four consecutive 60 year terms in addition to a life sentence in the custody of the Attorney General.

The Ninth Circuit ruled that if Amicus Curiae could show at an evidentiary hearing that the U.S. Government was involved in his kidnapping by way of participation or sponsorship, Mexico's protest gave him standing to object to a violation of the Extradition Treaty. The Court of Appeals subsequently found that the aforementioned diplomatic notes constituted a formal protest by the Republic of Mexico into the manner in which the U.S. acquired personal

jurisdiction over Mr. VERDUGO. (939 F.2d at page 1343). Given the violation of the Extradition Treaty which it held had occurred, the proper remedy was to repatriate Mr. VERDUGO to Mexico. (939 F.2d at page 1362).

The Court of Appeals found that the treaty contained, by implication, a proscription against "the abduction of an individual from a foreign country without that State's consent." The Government of Mexico, the state whose sovereignty was violated in this case, has also demanded on the return of Respondent on this ground. (Joint Appendix 67-71).

On November 6, 1991, Mexico sent a third diplomatic note to the Department of State. This note referred to the August 31, 1987 note which it said "explicitly remarked on the illegality of the kidnapping of Mr.

VERDUGO-URQUIDEZ from Mexican territory, and denounced the violation of the Extradition Treaty in force between Mexico and the United States." (App. D, pp. 24a). This note further stated, "The Mexican agents that detained Mr. VERDUGO-URQUIDEZ overstepped their authority, and consequently ... violated Mexican, U.S. and international laws, since the Extradition Treaty forms part of the legislation of both countries." (App. D, pp. 25a). Finally, the note expressly requested the repatriation of Mr. VERDUGO.

SUMMARY OF ARGUMENT

The kidnapping of foreign nationals from their own country presents federal courts from exercising criminal jurisdiction over the victims when (1) an extradition treaty between the offended sovereign and the U.S. is in force; (2) when U.S. agents are

responsible for the kidnapping, either through instigation or ratification; and (3) the offended sovereign objects to the exercise of jurisdiction over the putative criminal defendant.

U.S. v. Rauscher, 119 U.S. 407 (1886), Ford v. U.S., 273 U.S. 593 (1927), and Cook v. U.S., 288 U.S. 102 (1933) all support this conclusion. Petitioner's reliance on Ker v. Illinois, 119 U.S. 436 (1880) and Frisbee v. Collins, 342 U.S. 519 (1952) is misplaced as those cases did not involve treaty violations, U.S. Government responsibility, diplomatic objection to criminal proceedings or Federal courts.

The existence of an extradition treaty with its detailed procedures for rendition, and in the instant case, alternative requirements that the requested country prosecute one of its

nationals if the request is refused, makes no sense whatsoever if the treaty can be ignored at will. Absent the existence of an extradition treaty, countries are under no obligation to surrender persons found within their territory to another nation to stand trial.

Because extradition treaties are self-executing, their terms, express or implied, can be enforced by private individuals, especially once the offended sovereign has registered its belief that a violation has occurred. The only remedy which can redress the affront to the sovereign which occurs in this type of situation is repatriation of the victim.

Finally, this Court is not barred from reaching the merits of the issue by the political question doctrine. Article III clearly extends the judicial

power to treaties, which are the law of the land under the Supremacy Clause. The mere fact that this case "touches upon foreign relations" is not sufficient to render it non-justiciable. This proposition is evidenced from the fact that Ker, Rauscher, Ford, and Cook were all decided upon their merits, notwithstanding that the conduct of foreign affairs was tangentially implicated. Additionally, it was the Government itself which invoked the jurisdiction of the District Court, not the Respondent or Amicus Curiae.

ARGUMENT

I.

KIDNAPPING FOREIGN NATIONALS TO DELIBERATELY BYPASS AN EXISTING EXTRADITION TREATY VIOLATES THE PURPOSE AND SPIRIT OF THE TREATY, THUS BREACHING AN IMPLICIT CONDITION.

In interpreting an international treaty, courts should be mindful that it is in the nature of a contract between nations to which general rules of construction apply. Societe Nationale Industrielle Aerospatiale v. U.S. District Court, 482 U.S. 522, 533 (1987). A court called upon to interpret a treaty must therefore begin with the text of the treaty and the context in which the written words are used. Air France v. Saks, 470 U.S. 392, 397 (1985). The treaty's history, the negotiations, and the practical construction adopted by the parties may

also be relevant. Choctaw Nation of Indians v. U.S., 318 U.S. 423, 431-432 (1943).

The clear import of treaty language controls unless application of the treaty according to its obvious meaning effects a result inconsistent with the intent or expectations of its signatories. Sumitomo Shoji American Inc. v. Avagliano, 457 U.S. 176, 180 (1982); Maximov v. U.S., 373 U.S. 49, 54 (1963); See also The Amiable Isabella, 6 Wheat 1, 72 (1921).

In construing a treaty, a Court has the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." Air France v. Saks, 470 U.S. 392, 399 (1985).

In Factor v. Laubenheimer, 290 U.S. 276 (1933), this Court stated:

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restrictive construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. (Citations).
>
> Factor v. Laubenheimer, supra, at pages 293-294. See also Jordan v. Tashiro, 278 U.S. 123, 127 (1928).

The history of negotiations, construction of the treaty by a political department of the Government, and diplomatic correspondence may also be of significance in interpreting the terms of a treaty. Factor v. Laubenheimer, supra, at pages 293-294. (See Bacardi Corp. v. Domenech, 311 U.S. 150, 165 fn.12 (1940) (diplomatic

correspondence from Cuba submitted by Solicitor General as relevant to legal position of Government of Cuba concerning treaty interpretation).

Application of these principles of treaty interpretation leads to the inevitable conclusion that the U.S. breached the terms of the Extradition Treaty by conceiving, initiating and participating in the forcible abduction of foreign nationals from Mexican territory.

In U.S. v. Rauscher, 119 U.S. 407 (1886), this Court noted that:

> It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that

> there was no well-defined obligation of one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and with the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.
>
> * * *
>
> (W)ith nearly all the nations of the world with whom our relations are such that fugitives from justice may be found within their dominions or within ours, we have treaties which govern the rights and conduct of the parties in such cases. These treaties are also supplemented by acts of Congress, and both are in their nature exclusive.

U.S. v. Rauscher, supra, at pages 411-412, 414-415. (Emphasis added).

The 1980 Treaty was designed to further closer cooperation "in the fight against crime" (Preamble, Jt.App. at page 72), as well as to protect the sovereignty and territorial integrity of both the U.S. and Mexico.

Article 4(1) delineates the territorial jurisdiction of the signatories. The Treaty provides that access to each country's national territory may only be gained pursuant to the treaty. Article 20(1).

Article 1 of the Extradition Treaty references the obligations of the signatories as "Contracting Parties." The U.S. and Mexico obviously believed that they were entering a valid and binding contract. Such an interpretation is entirely consistent with Article 23(4), setting forth the procedure whereby either Contracting Party may terminate the treaty by simply giving six months notice to the other Party. The U.S. has at no time ever suggested the treaty is not in force or that it intends to terminate the treaty.

The Treaty explicitly establishes the conditions under which either party

may request the surrender of a citizen of a Party from its domestic territory. However, these conditions are limited in the following respects: First, Article 1 compels that all the provisions of the treaty apply to extraditions and restricts the obligation of the requested party to extradite by limiting extradition to offenses committed outside the territory of the requesting party.

Article 2 further delineates the type of offenses for which extradition may be sought. Specifically, Articles 2, 3 (as well as the other Articles to the extradition treaty) repeatedly refer to the obligation by using the term "extradition shall take place" as opposed to other less commanding terms. This suggests these provisions are affirmative, not discretionary.

Articles 5, 6 and 7 specifically set forth circumstances under which extradition shall not be granted. They bar extradition for political offenses, purely military offenses, crimes for which the offender has already been tried, and when prosecution is barred by the statute of limitations. These provisions must be contrasted to Articles 8 and 9 of the treaty, which confer discretion upon the requested party to decline extradition. Under Article 8, when the offense for which extradition is requested is punishable by death under the laws of the requesting party, extradition then "may be refused."

Similarly, Article 9 contains discretionary provisions relating to each party's obligations to deliver its own citizens and its obligation to prosecute its citizens if a request for

extradition is denied. It should be noted that Mexican law prohibits extradition of Mexican citizens.

Article 11 even sets forth a procedure in the case of urgency for the provisional arrest of an accused or convicted person.

Finally, Article 14 provides that the decision of the territorial sovereign whether to extradite its national is final and that the surrender of the person sought is controlled by the laws of the territorial sovereign.

The detailed nature of the procedures set forth in the Treaty, the existence of discretion to decline to surrender nationals for extradition, the provision for finality of decisions, the creation of procedures for communicating the refusal to extradite, and the clear import of the language of the treaty is that the specified procedures limit the

circumstances under which a foreign national shall be brought from the territory of one contracting party into the jurisdiction of the other. This is in accordance with the lack of any duty to extradite in the absence of a treaty. This comprehensive framework was clearly intended by the parties to delineate the exclusive circumstances under which the surrender of suspects could occur.

A contrary interpretation would render certain provisions of the treaty completely meaningless. To the extent that Article 9 confers discretion to a requested Party to refuse extradition of its nationals, the U.S. could override the decision explicitly committed to Mexico's discretion by simply violating its sovereign territory and kidnapping the suspects as it did in these cases.

The procedures set forth throughout the treaty would be completely gutted.

The U.S. fully recognized the import of such a treaty provision. In the Presidential Message accompanying the treaty, President Carter stated that:

> The new U.S.-Mexico treaty would permit the U.S. to extradite its own citizens, as does the old treaty. Mexican law, however, prohibits the extradition of Mexican nationals. The treaty thus obliges the requested state, <u>if it does not extradite its own nationals, to submit the case to its competent authorities for a decision as to prosecution, provided that state has jurisdiction over the offense</u>.
>
> Presidential Message, Extradition Treaty Between the U.S. and Mexico-Changes in the New Treaty at 19 (emphasis added).

Although forcible abductions violate the terms of the treaty, there is nothing to prevent a nation from surrendering a fugitive as a matter of comity in the absence of a treaty. (<u>See U.S. v. Kauffman</u>, 858 F.2d 994, 1008 (5th Cir. 1988) (citing <u>Fiocconi v.</u>

Attorney General of U.S., 462 F.2d 475 (2d Cir. 1972), cert. denied, 409 U.S. 1059 (1972).

The aforementioned construction of the treaty is entirely consistent with the history of extradition treaties in effect since the 1800's. Apparently as early as 1881, it was contemplated that the extradition treaty between the U.S. and Mexico was intended to prevent the unconsented abduction of nationals from a foreign country. Letter of Secretary of State James Blaine to O.R. Roberts, Governor of Texas (May 3, 1881), in Domestic Letters of the Department of State, 1784-1906 (National Archives Microfilm Publication M40, Rule 93).

In 1887, after Ker v.Illinois had been decided, Secretary of State Bayard reaffirmed the position that Mexico's kidnapping of Francisco Arresures from Texas to stand trial was "obtained" not

in accordance with, but in fraud of existing treaties.

In 1985, Abraham Sofaer, then the legal advisor to the State Department, further commented:

> ... Such acts (referring to foreign abductions by U.S. officials) might also be viewed by foreign states as violations of international law and incompatible with the bilateral extradition treaties that we have in force with those nations.
>
> Hearings on S. 1429 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1986).

Based upon the diplomatic notes exchanged between the Republic of Mexico and the Department of State relating to the kidnappings of Mr. VERDUGO and Respondent, it is clear that Mexico believes that the forcible abduction of its nationals from within its borders constitutes a violation of the provisions of the extradition treaty. This view is also consistent with the

exchange of diplomatic notes between the U.S. and Canada wherein Secretary of State George P. Schultz agreed to act to deter "transborder abductions".

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900). See also, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).

Interpretation of the instant provisions of the extradition treaty in accordance with customary international law also mandates the conclusion that forcible abductions violating the sovereign territory of Mexico violated the provisions of the treaty and customary international law. See

Rodriquez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981), (applying customary international law relating to the Universal Declaration of Human Rights and the American Convention of Human Rights to the due process clause to the U.S. Constitution).

Article 31(3)(c) of the Vienna Convention on the Law of Treaties adopted, May 22, 1969, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 8 INT"L LEG.MAT. 674 (1969), requires that, in interpreting a treaty, "there shall be taken into account ... any relevant rules of international law applicable in the relations between the parties." The Executive Branch has stated that the Convention "is already recognized as the authoritative guide to current treaty law and practice." S.Exec.Doc.L, 92d Cong.1st Sess. (1971) at 1.

The international norm is that "a state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." Restatement (3d) of Foreign Relations Law of the U.S., section 432(2).

The treaty's lack of an express prohibition on state sponsored kidnapping is of no importance, because the parties already believed such action was barred under international norms.

According to the Charter of the United Nations, June 26, 1945, 59 Stat. 1031 T.I.A.S. No. 993, Article 2(4), the avoidance of kidnapping a foreign national was one of the focuses of modern extradition treaties. See also Charter of Organization of American States, April 30, 1948, 2 U.S.T. 2394,

2429, T.I.A.S. No. 2361, as amended, Protocol of Buenes Aires, February 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, Article 20.

This Court has noted that statutes, wherever possible, must be interpreted consistently with international law. Weinberger v. Rossi, 456 U.S. 25, 32 (1982). (Citing Murray v. The Charming Betsy, 6 U.S. 64, 118 (1804)).

In 1976, Congress specifically prohibited the DEA from taking part in arrests of foreign nationals in the sovereign territory of other governments. 22 U.S.C. section 2291(c). Foreign Assistance Act of 1961 as amended, section 481(c), as enacted by section 504(b) of the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 764 ("Mansfield Amendment"). This action was a specific response to

concerns over DEA activities abroad. Sen. Comm. on For. Rels., Internal Security Assistance And Arms Expert Control Act, Report On S. 2662, S.Rep.No. 605, 94th Cong.,2d Sess. 55 (1976), reprinted in, 1976 U.S. Code Cong. & Admin. News 1378. This statute the aforementioned international law, prohibits the type of actions undertaken by the Government in these cases.

Notwithstanding the foregoing weight of authority, the Government has chosen to ignore its international obligations and to flagrantly disregard the sovereignty of a Government with whom it professes to maintain friendly relations. Simply put, the extradition treaty was violated.

II.
THE TREATY VIOLATION HAS DEPRIVED ARTICLE III COURTS OF ANY JURISDICTION TO HOLD RESPONDENT AND AMICUS CURIAE TO ANSWER FOR CRIMINAL OFFENSES AGAINST THE UNITED STATES.

Restrictions on American seizures which occur incident to American action abroad may be imposed by the political branches through diplomatic understanding, treaty or legislation, even though the Constitution itself may not impose similar restrictions. U.S. v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990). U.S. v. Curtiss-Wright Corp., 299 U.S. 304, 318 (1936) ("Operation of the nation in foreign territory must be governed by treaties, international understandings and compacts and the principles of international law"). Accordingly, an extradition treaty may properly limit the circumstances by

which the U.S. may obtain jurisdiction over an individual.

This Court has previously ruled that violations of self-executing treaties can deprive the Court of jurisdiction.

In U.S. v. Rauscher, 119 U.S. 407 (1886), this Court rejected the same arguments presently advanced by the Government, where it held that a person extradited pursuant to the Great Britain/U.S. extradition treaty had standing to object to his prosecution on different charges. Notwithstanding the absence of a provision in the treaty adopting the Rule of Specialty, the court held that the defendant could properly object to his prosecution as a violation of the treaty. The Court specifically noted that the "proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he

was extradited is met by the manifest scope of the treaty itself." Rauscher at page 422.

In Rauscher, this Court explained that:

> It can hardly be supposed that a Government which was under no treaty obligation or any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless the case was made of some specific offense of a character which justified the Government into depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such a person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party.
>
> (The foregoing authorities) all show that (the treaty) is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his

> extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.
>
> U.S. v. Rauscher, supra, at page 422. (Emphasis added).

In Cook v. U.S., 288 U.S. 102 (1933), this Court interpreted the same treaty involved in Ford v. U.S., 273 U.S. 593 (1927), as imposing a limitation upon U.S. seizures of British vessels on the high seas. Cook was the master of the vessel who contested forfeiture proceedings of the cargo and ship. This Court considered the language of the treaty and its history in concluding that Cook had standing to raise violations of the treaty. Although the record does not reflect an official protest by Great Britain, it is evident that prior protests of seizures had occurred and that the treaty was designed to avoid further difficulties.

See U.S. v. Kaufman, 858 F.2d 994, 1008 (5th Cir. 1988) ("Rauscher , which involved an extradition treaty between the U.S. and Britain, was decided against a backdrop of political controversy over precisely whether the treaty contained a rule of specialty").

The Government argued that the illegality of the seizure was immaterial, that the Federal court had jurisdiction and that the claimant by answering waived any rights to object. This Court explicitly rejected these arguments, stating that, "To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty." Id. at pages 121-122.

This application of Rauscher, Cook, and Ford has been consistently applied by the lower courts. U.S. v. Schouweiler, 19 F.2d 387 (S.D. Cal.

1927); U.S. v. Ferris, 19 F.2d 925 (N.D. Cal. 1927) (sustaining pleas to the jurisdiction of the court); and U.S. v. Postal, 589 F.2d 862, 875 (5th Cir. 1979), cert. denied, 444 U.S. 832 (1979) ("We read Cook and Ford to stand for the proposition that self-executing treaties may act to deprive the U.S., and hence its courts, of jurisdiction over property and individuals that would otherwise be subject to that jurisdiction."); Collier v. Vaccaro, 51 F.2d 17, 19 (4th Cir. 1931) ("An unlawful arrest is not merely an offense against the peace and dignity of the State; an unlawful carrying of a citizen beyond its boundaries to be dealt with by the laws of another state is a violation of the sovereignty of the former."); Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987) (acknowledging that removal of a foreign national from a

country which is a party to an extradition treaty with the U.S. accomplished by U.S. agents would constitute a violation of the treaty.)

Under Rauscher, Cook, and Ford, this Court clearly lacks jurisdiction over Respondent and Amicus as a result of their seizure in violation of the extradition treaty.

III.
THE KER-FRISBEE DOCTRINE IS INAPPLICABLE TO THE SPECIFIC FACTS OF THIS CASE.

In Ker v. Illinois, 119 U.S. 436 (1886), a U.S. citizen was forcibly returned to the U.S. by private Pinkerton security guards. Ker had fled to Peru after his indictment in Illinois state court on fraud and embezzlement charges. At the time of Ker's abduction, Peru was in fact occupied by the Chilean Army. The private security guard carried an official request for

extradition within the framework of the 1870 extradition treaty between the U.S. and Peru, but the seizure was made outside of formal extradition proceedings. This Court explicitly rejected Ker's claimed "right of asylum" under the treaty, which presupposed that a criminal defendant has the right to insist that procedures under an existing extradition treaty be followed. This Court reasoned that since Peru had the sovereign right to deport Ker if it chose, it similarly had the right to consent explicitly or tacitly to his "informal rendition."

Ker did comment that the treaty did "regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom." Id. at 442.

Ker did not address the present situation in which a signatory to a treaty with the U.S. formally objected to the forcible abduction of one of its nationals from within its borders. Rather, Peru did not object at all.

Petitioner also relies upon Frisbie v. Collins, 342 U.S. 519 (1952). Frisbie involved the forcible kidnapping by Michigan police of a murder suspect living in Illinois. This Court rejected a due process claim based on this forcible abduction and also a claim based on the Federal Kidnapping Act. Frisbie did not deal with claimed treaty violations and thus does not support Petitioner's arguments in any way.

All of the cases cited by Petitioner which rely upon Ker-Frisbee and its progeny, are factually and legally distinguishable from the instant case by one or more of the following factors:

1) The absence of an official protest by the government of the country from which the suspect was abducted, 2) direct involvement or consent of the foreign government in the rendition of the suspect to the U.S.; 3) the absence of direct involvement of the U.S. in the abduction (or the fact that a state, not the federal government, was a party to the criminal proceedings); or 4) the lack of a valid international extradition treaty.

In the past fifty years, there have apparently been only three formal protests filed by foreign sovereigns regarding the circumstances in which an individual has been abducted, namely the instant cases and Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987) (protest by Canada, but no U.S. involvement in abduction).

See U.S. v. Lira, 515 F.2d 68 (2d Cir. 1975), cert. denied, 423 U.s. 847 (1975)(Chilean Government voluntarily honored a DEA request); U.S. v. Cordero, 668 F.2d 32 (1st Cir. 1981), (Panama and Venezuela voluntarily deported suspects); U.S. v. Valot, 625 F.2d 308 (9th Cir. 1980), (Thailand voluntarily deported the suspect); U.S. v. Lovato, 520 F.2d 1270 (9th Cir. 1975), cert. denied, 423 U.S. 985 (1975)(defendant was expelled by Mexican officials); U.S. v. Cotten, 471 F.2d 744 (9th Cir. 1973), cert. denied, 411 U.S. 936 (1973)(U.S. citizens voluntarily deported from Vietnam); U.S. v. Hamilton, 460 F.2d 1270 (9th Cir. 1972), (U.S. citizen voluntarily delivered); U.S. v. Herrera, 504 F.2d 859 (5th Cir. 1974), (defendant voluntarily deported by Peruvian authorities); U.S. v. Toro, 840 F.2d 1221 (5th Cir. 1988), (Panamanian

authorities voluntarily turned the defendant over to DEA agents); U.S. v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986), cert. denied 480 U.S. 919 (1987)(defendant turned over pursuant to a Colombian expulsion order); U.S. v. Marzano, 537 F.2d 257 (7th Cir. 1976), cert. denied, 429 U.S. 1038 (1977)(defendant turned over by Grand Cayman authorities); Wentz v. U.S., 244 F.2d 172, 176 (9th Cir. 1957), (no U.S. involvement in defendant's voluntary rendition to U.S. by Mexican officials); Stevenson v. U.S., 381 F.2d 142 (9th Cir. 1967), (no U.S. involvement in Mexican decision to deport U.S. citizen); U.S. v. ex rel. Lujan V. Gengler, 510 F.2d 62 (2d Cir. 1975), cert. denied, 421 U.S. 1001 (1975)(absence of an official protest); Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990), cert. denied, 111

S.Ct. 209 (1990) (Honduran participation in Matta's arrest); U.S. v. Kaufman, 858 F.2d 994 (5th Cir. 1988), (no evidence that the Mexican Government objected to trial); U.S. v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988) (Neither Guatamala nor Belize protested Respondent's detention); U.S. v. Evans, 667 F.Supp. 974, 979 (S.D.N.Y. 1987), (no protest by Bermuda); U.S. v. Davis, 767 F.2d 1025 (2d Cir. 1985), (given the absence of any protest from either Switzerland or the U.S. as to a mutual assistance treaty, the defendant had no standing to move to exclude or suppress Swiss bank records on the basis of a purported violation of the treaty.) Ex Parte Lopez, 6 F.Supp 342 (S.D. Tex. 1934) (no U.S. involvement.)

The Frisbie line of cases deals only with abductions of suspects from one state to another. There were no

international treaty obligations at issue under Frisbie. See e.g. Mahon v. Justice, 127 U.S. 700 (1888) (states of the Union have only limited sovereignty and therefore do not have the same sovereign rights to protest the invasion of their territory).

In Ford v. U.S., 273 U.S. 593 (1927), this Court highlighted the critical turning point distinguishing that case and the instant case from Ker , namely, Ker was not decided upon treaty grounds. The Court specifically stated that Ker did not call upon the Court to determine whether the seizure violated the treaty and if so, whether "the power of the Court to hold the defendant for trial" was implicated. Id. at page 606.

Because a treaty violation is at issue, unlike Ker and Frisbee, and also because the U.S.' involvement is

manifest, those cases are simply not applicable to the instant facts. As was the case in Ford v. U.S., supra, this Court should reject the Solicitor General's assertion that Ker v. Illinois governs what is a quite different question.

IV.
THE VICTIM OF THE KIDNAPPING HAS STANDING TO RAISE THE TREATY VIOLATION AS A BAR TO HIS PROSECUTION IN THE OFFENDING COUNTRY.

This Court has long recognized extradition treaties as self-executing regardless of whether the treaty term is implicit (U.S. v. Rauscher, supra) or explicit, or whether it provides a mechanism for domestic enforcement. Valentine v. U.S., 299 U.S. 5 (1936); Johnson v. Browne, 205 U.S. 309 (1907). See Dennis v. Higgins, 111 S.Ct. 865 (1991)(finding implicit rights of individuals under the commerce clause, a

self-executing constitutional limit action on state power).

As early as 1865, the U.S. Government recognized that extradition treaties create more than "rights only between the Governments concerned." Letter from Secretary of State Gresham to German Ambassador. See IV Moore, International Law Digest, 321 (1906).

Some years earlier, this Court in U.S. v. Rauscher, supra, stated that:

> A treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law and which are capable of enforcement as between private parties in the courts of the country . . . When rights (of a private citizen or subject under a treaty) are to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.
>
> * * *
>
> Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in

every particular, its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that fugitive passes into the hands of the country which charges him with the offense, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and of all the rights which the law governing that proceeding was intended to secure.

* * *

{U}nder the doctrine that the treaty is the supreme law of the land, and is to be observed by all the courts, state and national, "anything in the laws of the states to the contrary notwithstanding," if the state court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the Federal Government, which has been fully recognized. This remedy is by writ of error from the Supreme Court of the U.S. to the state court which may have committed the error. ... If the party, however, is under arrest and desires a more speedy remedy in order to secure his release, a writ

> of habeas corpus from one of the Federal Judges or Federal Courts, issued on the ground that he is restrained of his liberty in violation of the Constitution or a law or a treaty of the U.S., will bring him before a Federal tribunal, where the truth of that allegation will be inquired into, and, if it be well founded, he will be discharged. ... That is a complete answer to the proposition that the rights of persons extradited under the treaty cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress.
>
> U.S. v. Rauscher, supra, at pages 418-419, 421, 430-431. (emphasis added).

In Ford v. United States, 273 U.S. 593 (1927), this Court explicitly recognized that persons seized on the high seas in violation of a treaty between Great Britain and the U.S. may raise the violation of the treaty as a defense. There, the defendants did not enter a plea to the jurisdiction (subsequently abolished by the Federal Rules of Criminal Procedure) and

therefore could not raise it for the first time on appear. See alsoCook v. United States, 288 U.S. 102 (1933) (private party had standing under same treaty).

The purpose of the treaty and objectives of its creators clearly indicate that the treaty, especially Article 9, was intended to confer individual rights enforceable in court, at least as an affirmative bar to jurisdiction. Moreover, because the treaty creates a specific right, a remedy must be implied to protect that right. See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (allowing award of damages to redress Fourth Amendment violations); Texas Pacific Railway Co. v. Rigsby, 241 U.S. 33, 40 (1916) ("A civil remedy may be implied for those clearly within the protective

realm of legislation or obligations in the national interest").

Respondent and Amicus have standing to raise the treaty violation as a bar to prosecution in this country by virtue of the fact that they are the direct beneficiaries of the interests protected by the treaty.

In Sierra Club v. Morton, 405 U.S. 727 (1871), this Court stated that:

> Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' (citation) as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." (Citation).
>
> Sierra Club v. Morton, supra, at pages 732-733.

The doctrine of standing serves both as a constitutional limitation on judicial power deriving from the case in

controversy requirement in Article III for exercise of the federal judicial power, and a self-imposed prudential doctrine intended to monitor judicial review of public acts. The standing inquiry focuses on the party before the court, asking whether he has such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf. Werth v. Selden, 422 U.S. 490, 498-499 (1975); Baker v. Carr, 369 U.S. 186, 204 (1962). Here, Respondent and Amicus are not invoking federal court jurisdiction, but challenge it by virtue the violation of a treaty which confers certain rights upon them. They are only seeking to justify the exercise of the Court's remedial powers.

In this sense, the term standing is misleading. Nevertheless, Respondent and Amicus have a direct interest against being subject to any criminal proceedings that violate treaty provisions. The fact that Amicus is currently imprisoned in the Federal Penitentiary at Leavenworth, Kansas, and ineligible for parole until the late 21st century (and Respondent being held in lieu of a ten million dollar bond) is a sufficient interest to invoke the Court's remedial powers.

Federal courts have repeatedly held that individuals situated in the same positions as Respondent and Amicus have standing to raise the treaty violation as the result of a clear and unequivocal protest by the offended sovereign. Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990), cert. denied, 111 S.Ct. 209 (1990); U.S. v.

Verdugo-Urquidez, supra, 939 F.2d at page 1355, fn.13 (noting that some circuits no longer require a protest be filed to coffer standing to raise a specialty violation); U.S. v. Cuevas, 847 F.2d 1417, 1427 (9th Cir. 1988), cert. denied, 109 S.Ct. 422 (1989); U.S. v. Zabeneh, 837 F.2d 1249 (5th Cir. 1988).

As the Court stated in U.S. v. Diwan, 864 F.2d 715 (11th Cir. 1989), cert. denied, 109 S.Ct. 3249 (1989):

> In U.S. v. Rauscher, 119 U.S. 407 (1886), the Supreme Court fashioned a remedy for the accused threatened with prosecution for offenses other than those for which extradition had been granted. However, the objective of the rule is to ensure that the treaty is faithfully observed by the contracting party. (Id. at page 430). The extradited individual therefore, can raise only those objections to the extradition process that the surrendering country might consider a breach of the extradition treaty.
>
> U.S. v. Diwan, supra, at page 721.

As a result of Mexico's protest, the harm to Respondent, and Amicus and the purpose of the treaty, standing to object to the violation of a self-executing treaty has been conferred. To deny standing would be to totally ignore the purpose and objectives of the treaties' founders. See U.S. ex rel. Donnelly v. Mulligan, 76 F.2d 411, 512-513 (2d Cir 1935) ("A rule of domestic law conferring a judicial remedy on the extraditee can be a rule according him the remedy only if the surrendering Government would object, since the underlying substantive wrong, which grows out of international law, is only to the latter.") Fiocconi v. Attorney General of U.S., 462 F.2d 475 (2d Cir. 1972), cert. denied, 409 U.S. 1059 (1972) ("Justice Gray concurred in the result of Rauscher on the grounds that, in his view, Rev.Stat.

section 5275 (now Title 18 U.S.C. section 3192), providing for the protection of persons delivered by any foreign government, indicated the intention of Congress to vest extradited persons with a judicial remedy for breach of an extradition treaty by the U.S.").

V.
THE INSTANT ISSUE IS NOT A POLITICAL QUESTION.

As this Court itself noted in Baker v. Carr, 369 U.S. 186 (1962), "It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Id. at page 211. This Court has stated that an issue is nonjusticiable under the political question doctrine when one of the following circumstances is present:

> (1) 'a textually demonstrable constitutional commitment of the issue to a coordinate political

> department'; (2) 'a lack of judicially discoverable and manageable standards for resolving it'; (3) 'the impossibility of deciding without an initial policy determination of a kind clearly nonjudicial discretion'; (4) 'the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government'; (5) 'an unusual need for unquestioning adherence to a political decision already made'; or (6) 'the potentiality of embarrassment from multifarious pronouncements by various departments on one questions.'
>
> INS v. Chadha, 462 U.S. 919, 941, 2779, 77 L.Ed.2d 317 91983) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962).

The Baker Court identified several instances where, although the Executive Branch's dominant role in conducting the foreign affairs of the U.S. was implication, the controversy was subject to judicial action:

> 'Although a court will not ordinarily determine whether a treaty has been terminated, in the absence of conclusive government action, a court may construe a treaty and determine the answer'. Terlinden v. Ames, 184 U.S. 270, 285

(1902); Society for the Propagation of the Gospel in Foreign Parts v. New Haven, 21 U.S. (8 Wheat) 464 , 492-495 (1823); Clark v. Allen, 331 U.S. 503 (1947).

Similarly, a court may act to determine whether a state of belligerency exists abroad to determine the applicability of neutrality statutes when the "executive proclamations" fall short of "a conclusive answer." The Three Friends, 166 U.S. 1, 63, 66 (1897).

Although it is the executive that determines a person's status as a representative of a foreign government, (Ex Parte Hitz, 111 U.S. 766 (1884)), the executives' statements will be construed where necessary to determine the court's jurisdiction. In re Baiz, 135 U.S. 403 (1890).

Similar judicial action in the absence of a recognizedly authoritative executive declaration occurs in cases involving the immunity from seizures of vessels owned by friendly foreign governments. Compare Ex Parte Peru, 318 U.S. 578 (1943) with Mexico v. Hoffman, 324 U.S. 30, 34-35 (1945).

Baker v. Carr, supra, at pages 211-213.

Properly understood, the political question doctrine restrains courts from reviewing an exercise in foreign policy

judgment by the coordinate political branch to which authority to make that judgment has been constitutionally committed. Goldwater v. Carter, 444 U.S. 996, 1006 (1979) (Brennan, J., dissenting from grant of certiorari and dismissal of case.) This case presents no such instance.

In Shapiro v. Secretary of State, 499 F.2d 527 (D.C. Cir. 1974), the Court noted that:

> ... subject to judicial determination of the applicability of the existing treaty obligations of the U.S. to the facts of a given case, extradition is ordinarily a matter within the exclusive purview of the executive.
>
> Shapiro v. Secretary of State, supra, at page 531.

Courts presiding over extradition cases are routinely called upon to determine the existence of subject matter and personal jurisdiction as well as the existence of a valid treaty.

Courts are also called upon to interpret the terms of the treaty. Emani v. District Court, 834 F.2d 1444, 1447 (9th Cir. 1987); Theron v. U.S. Marshal, 832 F.2d 492, 495 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988).

Under Article III, the courts clearly have textual authority to construe treaties and fashion remedies to enforce rights, Japan Whaling Association v. American Cetacean Society, 478 U.S. 221, 230 (1986); Bivens v. Six Unknown Named Agents, supra, 403 U.S. at page 392. Furthermore, it is beyond dispute that it is the province of the judiciary to say what is the law. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

All that this Court is required to do in this case is determine which of the contracting parties' interpretations of the treaty is more consistent with

the purpose and objectives of the treaty and the long-standing norms of international law which of necessity, govern the relations between the U.S. and Mexico. As Respondent ably points out, the Government, not Respondent or Amicus, has invoked the jurisdiction of this Court by filing criminal charges and orchestrating kidnappings from Mexico to enforce the narcotics laws. It then asks this Court to turn a blind eye towards its actions, in effect giving it carte blanche to act around the world as it sees fit without <u>any</u> accountability. This Court is the final arbiter of the legality of Government action and has the clear authority to determine whether a treaty, as the supreme law of the land, has been violated as the result of the Executive's failure to faithfully execute the laws.

See The Paquete Havana, 175 U.S. 677 (1900), (holding that the seizure of fishing vessels in violation of customary international law was found to be justiciable in U.S. courts)

CONCLUSION

"For better or worse, we live in a world of nation-states," in which our Government must honor the letter and spirit of its freely negotiated international compacts and obligations. U.S. v. Verdugo-Urquidez, 494 U.S. at page 275. Repatriation of Respondent and Amicus will serve this important interest.

Amicus Curiae VERDUGO respectfully requests that the decisions of the U.S. Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

GOLDBERG, FRANT & HALL

PATRICK Q. HALL
March 4, 1992

CHARLES L. GOLDBERG
March 4, 1992

CERTIFICATE OF SERVICE

I, RONALD M. FRANT, hereby certify that I am a member of the Bar of the United States Supreme Court and that on March 5, 1992, I caused forty copies of the revised Brief of Amicus Curiae RENE MARTIN VERDUGO-URQUIDEZ in Support of Respondent HUMBERTO ALVAREZ-MACHAIN to be mailed first class to the Clerk of the United States Supreme Court. I also certify that I served in identical fashion three copies of the aforementioned document upon the Office of the Solicitor General of the United States, Department of Justice, Washington D.C. 20530 and three copies upon Paul L. Hoffman, Counsel of Record for Respondent HUMBERTO ALVAREZ-MACHAIN by mailing them to the ACLU Foundation of Southern California, 1616 Beverly Boulevard, Los Angeles, California 90026.

RONALD M. FRANT

AMICUS.BRF/VERDUGO